



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MERU

CIVIL DIVISION

HIGH COURT CIVIL MISC. APPL. NO. 60 OF 2014

SILAS MUTUMA KABWIMA...Proposed APPELLANT/APPLICANT

VERSUS

JOSEPHAT NTONGAI M'ITHUNGAI.....Proposed RESPONDENT

RULING

1. The application dated 28th November, 2014 and filed in court on 2nd December, 2014 seeks orders that this Honourable Court be pleased to grant leave to the proposed Appellant/Applicant to file appeal out of time in the judgment and decree of C. Kemei in Maua PMCC No. 238 of 2010.

2. It is stated in the grounds and the affidavit in support of the application that the judgment of the Lower Court was delivered on 8th October, 2013. The delay in filing the appeal is blamed on the failure by the Lower Court to provide the proceedings and judgment in an expeditious manner.

3. The application is opposed. It is stated in the replying affidavit that the Lower Court proceedings and judgment were not necessary for the filing of the Memorandum of appeal. That the delay of almost two years is inordinate. That the judgment was delivered on 8th October, 2013 but it was not until 5th November, 2013 that the letter dated 8th October 2013 requesting for proceedings was received in court. The application was termed as an afterthought.

4. The application was disposed of through written submissions. I have considered the said submissions.

5. Section 79G of the Civil Procedure Act provides that:

“Every appeal from a subordinate court to the High Court shall be filed within a period of 30 days from the date of the decree or order appealed against, excluding from such period any time which the lower court may certify as having been requisite for the preparation and delivery to the appellant of a copy of the decree or order. Provided that an appeal may be admitted out of time if the appellant satisfies the court that he had good and sufficient cause for not filing the appeal in time.”

(See also Section 59 of the Interpretation and General Provisions Act and Order 50 rule 6 Civil Procedure Rules and Section 3A Section 95 of Civil Procedure Act Cap 21 Laws of Kenya)

6. The court therefore has the discretion to extend time within which to file an Appeal. As stated by the Court of Appeal in the case of **Aviation Cargo Limited v St. Mark Freight Services Limited [2014] eKLR**:

“...whether or not to grant extension of time or leave to file and serve record of appeal out of time is discretionary. Such discretion is exercised judicially with a view to doing justice. Each case depends on its own merit. For the Court to exercise its discretion in favour of an applicant, the latter must demonstrate to the Court that the delay in lodging the record of appeal is not inordinate and where it is inordinate the applicant must give plausible explanation to the satisfaction of the Court why it occurred and what steps the applicant took to ensure that it came to Court as soon as was practicable. In the normal vicissitudes of life, deadlines will be missed even by those who are knowledgeable and zealous. The Courts are not blind to this fact. When this happens, the reason why it occurred should be explained satisfactorily including the steps taken to ensure compliance with the law by coming to Court to seek extension of time or leave to file out of time.”

7. In the case at hand, the application was filed after a period of about one year and three months following the delivery of the judgment. The

Applicant has exhibited a letter dated 22nd October, 2013 requesting for proceedings and Judgment. The court stamp reflects that the said letter was received in court on 5th November, 2013. The typed proceedings were certified by the court on 6th October, 2014. A certificate of delay dated 11th November, 2014 issued by the Lower Court was also annexed to the supporting affidavit. The said certificate states that the delay was occasioned by the heavy workload in the court's typing pool.

8. The explanation given reflects that the delay was caused by the court and not by the Applicant. A diligent counsel requires to peruse the proceedings and judgment in order to consider whether to file an appeal.

9. With the foregoing, I allow the application on the condition that the Memorandum of appeal is filed and served within 14 days from the date hereof. In default the application to stand dismissed.

B. THURANIRA JADEN

JUDGE

Dated, signed and delivered in Meru this 31st day of July, 2018

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